

Whayne Supply Company and Forrest Jackson.
Case 25-CA-22608

July 18, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND DEVANEY

On March 15, 1994, Administrative Law Judge Thomas R. Wilks issued the attached decision. The General Counsel filed limited exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Whayne Supply Company, Evansville, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

¹No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by suspending Forrest Jackson on June 7, 1993, and discharging him on June 8, 1993, because he refused to cross a lawful picket line at a customer's premises to perform his regular work duties, and by Supervisor Strattman's statement to field technician Herschel Koller, during late June 1993, that Jackson had been dismissed because he would not cross a picket line. However, we decline to consider on the merits the 8(a)(3) allegation raised in the General Counsel's exceptions. We find it unnecessary to find the 8(a)(3) violation because it would not substantially affect the judge's remedy for the 8(a)(1) violation that he found and that we are adopting. We therefore deny the General Counsel's exception. Cf. *American Transportation Service*, 310 NLRB 294 fn. 2 (1993).

²The General Counsel excepts to the description of Forrest Jackson's work in the judge's notice as being "work that would normally be done by employees of another employer then on strike." The General Counsel contends that the subject work was always done by the Respondent's employees. We find merit in this exception and have accordingly substituted the attached notice for that of the judge.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with discipline up to and including discharge if they cross a picket line maintained by the United Mine Workers of America, or any other union.

WE WILL NOT tell our employees that we discharged an employee because he refused to cross a picket line maintained by the above Union, or any other union.

WE WILL NOT terminate or suspend employees because they refuse to cross lawful picket lines at customer locations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to employee Forrest Jackson to the position he would have held, but for our wrongful suspension and discharge of him on June 7 and 8, 1993, and, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify Forrest Jackson that we have removed from our files any reference to his suspension and discharge and that the discharge will not be used against him in any way.

All of our employees are free to engage in concerted activities for their mutual aid and protection within the meaning of Section 7 of the Act or to refrain from such activities.

WHAYNE SUPPLY COMPANY

John Petrisson, Esq. and Ann Rybolt, Esq., for the General Counsel.

Joseph Worthington, Esq. and W. Kevin Smith, Esq., of Louisville, Kentucky, for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. The unfair labor practice charge was filed July 2, 1993, by Forrest Jackson, an individual, against his former employer, Whayne Supply Company (the Respondent).¹ On August 13, 1993, the Regional Director issued a complaint alleging that Re-

¹ Respondent's name is corrected as reflected in the answer.

spondent, by its agent and manager, Michael Morris, violated Section 8(a)(1) of the Act on about February 8, 1993, by threatening employees with disciplinary action, up to and including discharge, if they refused to cross United Mine Workers of America (UMWA) picket lines at certain Peabody Coal, Inc. mines. It is also alleged that Respondent violated Section 8(a)(1) and (3) of the Act by first suspending on June 7, 1993, and then discharging on June 8, 1993, employee Forrest Jackson because he refused to cross the above-named Union's picket line at the Old Ben Company coal mine 1 at Spurgeon, Indiana.

Respondent filed a timely answer which denied responsibility for the threats and/or their coercive nature. Respondent further answered that Jackson had been permanently replaced for valid economic reasons because of his refusal to cross the UMWA picket line.

The trial of this matter was held in Evansville, Indiana, on November 9, 1993. At the trial, the General Counsel amended the complaint to add an additional violative threat of discharge by Foreman Steve Stratman to employees on June 28, 1993, if they refused to cross UMWA picket lines. All parties were given full opportunity to adduce relevant evidence by way of examination of witnesses, or documentary exhibits, to argue orally, and to file posthearing briefs. Both parties chose to file posthearing briefs, which were to be due on December 15, 1993. However, because of a variety of mishaps which plagued both parties, several extensions of time were granted, and the briefs were not received by my office until February 23, 1994.

On the entire record, including the briefs submitted by both parties, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times Respondent, a corporation with a place of business in Evansville, Indiana (Respondent's facility and facilities in other States), has been engaged in selling, leasing, and servicing construction equipment and industrial engines and providing related products and services. During the past 12 months, Respondent, in conducting its business operations, derived gross revenues in excess of \$100,000. During the same period, Respondent, in conducting its business operations, purchased and received at its Evansville facility goods valued in excess of \$50,000 directly from points outside the State of Indiana.

It is admitted, and I find, that at all times material Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is admitted, and I find, that at all times material the United Mine Workers of America (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent maintains its main office in Louisville, Kentucky, and branch locations at six other locations in Ken-

tucky as well as one at Evansville, Indiana. At these locations, Respondent sells, leases, and services machinery manufactured by Caterpillar, Inc. That product line is variously called caterpillar or CAT. The machinery varies from a wide variety of trucks and earth-moving tractors, including "dozers," excavators, loaders, and scrapers. Some of the machines are humongous. For example, scrapers weigh 81,000 pounds, are 33 feet long and about 15 feet high and 15 feet wide, and cost about \$1 million each. Respondent also services other brands of machinery as well as machinery purchased from another source.

The natural clientele for Respondent's products, among many others, are coal mines. Two of those coal mine customers, Peabody Coal, Inc. and Old Ben Company, account for about 20 percent of Respondent's parts business. Peabody alone provides three times as much business as the next largest customer. Respondent's parts sales account for \$4 million annually.

The Peabody and Old Ben mines serviced by Respondent are old locations which have millions of tons of coal reserves and at which are located permanent facilities for the storage and maintenance of machinery used by the mines. In total, Respondent services from 40 to 50 coal mine sites from the Evansville facility. In 1993, Respondent, at Evansville, serviced three or four Peabody sites but only the Old Ben mine 1 site, which were the sites of UMWA strike activity and picket lines.

Human Resources Vice President James Davis maintains his office at the Louisville headquarters. Charles Campbell is subordinate to him as a human resources manager. At Louisville, Frank Applegate is the vice president of branch operations. Michael Morris is the branch manager at the Evansville facility. Subordinate to him is Ron Skaggs, the branch service manager. Subordinate to Skaggs is Steve Stratman, field service foreman. Respondent admits that Morris, Stratman, and Skaggs are "supervisors of Respondent" but denies lack of authority to act as agents of Respondent within the meaning of Section 2(13) of the Act with respect to conduct alleged as violative in the complaint.

In early spring 1992, Respondent employed at Evansville a total of 42 service technicians, of which 24 were assigned to work in the shop. Of this group, Respondent also employed 14 field service technicians whose job was to render diagnostic and other maintenance service at the customer's worksites as the need arose. Stratman dispatched all field technicians. Some technicians serviced particular customers. Others were assigned with deference to their own residence locations which were spread far apart in that section of Indiana. There are several other categories of service-related employees also at Evansville. Except for two branch locations, Respondent's employees, including those at Evansville, are not represented by any labor organization.

It is the undisputed testimony of employee witnesses that in prior years they were not obliged by the Respondent to cross picket lines which had been established by the Union at Respondent customers' mines during periods of labor disputes there. Forrest Jackson was one of those field technicians who refused to cross picket lines with impunity.

B. The 1993 Peabody Mine Strike

On about February 1, 1993, the Peabody mines were subjected to a short period of picketing by the mine employees

in support of a union strike in a contractual labor dispute with that employer, of which there is no contention of illegality. After an indeterminate short period of picketing of about 2 weeks, a "cooling off period" was effectuated. A deadline for agreement was set for May 3, but the strike resumed on about May 10, 1993. However, during that initial period of the strike, Respondent became concerned as to how it would satisfy the persistent demands of Peabody for continued service during picketing and yet accommodate the concerns of its employees about crossing picket lines, particularly their concerns for their personal safety. Branch Manager Morris testified that he and the Evansville managers held at least two of a series of meetings in February with all the mechanical service employees at the Evansville facility, i.e., two meetings each with the field technicians and with the shop technicians. He testified that at the first meeting with the field technicians he discussed Peabody's demands for uninterrupted service and sought to obtain some sort of understanding with them about it, but the meeting became essentially a question-and-answer session. About 500 questions were posed by field technicians which, according to Morris, revolved around their desire to know what the consequences would be if they refused to cross the union picket line. He testified they voiced their "views" and "concerns" at the meeting and elsewhere. He did not testify as to what any particular employee said or did not say but conceded that there may have been individual conversations. Morris testified that Respondent thereafter explained to Peabody the field technicians' reluctance to cross any union picket line. Peabody was persistent and proposed a plan to bus the Respondent's field service technicians across the picket line and to house them on the strikebound site in prefabricated buildings for a prolonged period of time, i.e., 12-14 days. Peabody intended to house a total complement of 34 vendor technicians at the site. Respondent refused to provide more than two technicians at a time.

Shortly after the foregoing meeting, according to Morris, a second meeting was held between all 42 of the Respondent's Evansville field service technicians and mechanics and the Evansville management team which, as it had earlier, represented and spoke authoritatively for Respondent. Several witnesses estimated that the meeting came only 2 days later. Some place it on February 15, others on February 10. Morris was not sure but thought it was possibly earlier on February 8 or 10. At one point, he placed it on February 15. Representing Respondent were Morris, Skaggs, and Stratman as well as Applegate and Steve Baylor from Louisville. Morris testified that all the employees were unhappy with the prospect of crossing a union picket line. Respondent's agreed plan with Peabody was explained, i.e., busing and onsite living accommodations. The technicians raised questions, objections, and problems with respect to the plan, e.g., medical access, religious obligations, and dietary limitations. Morris testified, in response to a Sabbath observance question, that Respondent would use a helicopter to provide egress and ingress. According to Morris, Respondent "pushed Peabody so hard" with respect to the employee concerns that it later terminated Respondent's services at least for that period of time. Thus, no Respondent employee had any occasion to be dispatched to a strikebound Peabody plant when the strike resumed.

At issue is what Morris told Respondent's employees in answer to questions they asked at the first meeting, and which he conceded were reiterated by them at the second meeting, as to the consequences to them if they refused to cross a picket line upon being dispatched to a strikebound Peabody mine. It is the undisputed testimony of employee witnesses that in past strike situations, they were instructed to approach the picket line in an attempt to enter but were not obliged to cross if they chose not to do so. According to Morris' testimony, at the second meeting in February 1993, i.e., "lottery meeting," he instructed the employees that they would be bused across the picket line when dispatched for service work at a strikebound Peabody mine. However, he told them that the assignments would follow a lottery system whereby each field service technician was assigned a number from 1 through 14 pursuant to a chance drawing. The assignments would commence from the lowest number upward, and the designee would work at the Peabody site on a 12-day rotation basis.

Several employees testified as to Morris' response to inquiries as to what would be the consequence of an employee's refusal to cross the Peabody picket line if dispatched pursuant to the lottery. Forrest Jackson had been employed by Respondent since July 1974 and for the last 5 years as a field technician. According to Jackson, the busing plan and the lottery were announced at the first meeting. He testified, without contradiction, that at the first meeting, which he placed on February 8, he announced his opposition to busing across a picket line and that he openly solicited the opinion of several other field technicians who also announced to Morris some opposition. He also testified credibly, without contradiction, that he and all the other field technicians had discussed the issues privately among themselves prior to the February 8 meeting and had agreed that they all did not want to cross the Peabody picket line. Jackson testified that 10 minutes after the meeting he confronted Morris alone in Morris' office and asked him what would happen to an employee whose number came up but who refused to cross the Peabody picket line and that Morris told him that the "disciplinary actions" would be taken "up to dismissal, if necessary." Jackson further testified that he protested that this was contrary to Respondent's past policy whereby a technician could, with impunity, refuse to cross a picket line after having approached it but that Morris did not respond. Jackson testified that in that meeting he also told Morris that the technicians would be willing to drive their trucks up to the line to determine whether they would obtain entry, and that Morris responded that he would check with his superiors at Louisville. According to Jackson's recollection, Morris had announced at the February 8 meeting that he had already discussed the issue with Peabody and that the busing tactic and lottery system had been decided on.

Jackson's recollection of the sequence of meetings differs somewhat from Morris' testimony, which places the lottery and busing decision as being at the second meeting. However, at a later point in testimony, Morris referred to the lottery meeting as the last in a series of meetings. Jackson refers to only one other meeting, i.e., on February 10 between all the technicians, including the 14 field technicians, Morris, Skaggs, Stratman, and Louisville Respondent Representatives Applegate and Baylor. He did not place the latter two at the February 8 meeting. According to Jackson, at the February

10 meeting, the employees raised questions and concerns about their personal safety as well as their personal property and the safety of their houses and families. He testified, without contradiction, that he and at least 10 other field technicians supported an informal letter or petition by field technician Herschel Koller regarding questions of Respondent's liability for damage to their property and assurance of site egress for religious purposes.

Koller essentially corroborated Jackson but explained that the petition actually consisted of written questions put to Applegate because of Applegate's failure to put his assurances to these specific concerns in writing. Koller's testimony is confusing but suggests that there were two or three February meetings. He recalled a meeting 2 weeks before the lottery meeting. This could very well coincide with Morris' description of the first meeting. Koller placed Baylor and Applegate at the first meeting with the Evansville management team. Koller, like Morris, recalled that employees at that first meeting asked what the consequences would be if they refused to cross a Peabody picket line. Morris' testimony is silent as to his response at that first meeting. Koller testified that Morris answered that the employees would be subject to "disciplinary action up and through dismissal from the Company." He testified that this was repeated at the lottery meeting when the question was again raised "they would be subject to disciplinary action up and . . . including dismissal from the Company." He could not recall much of what was discussed, but that response remained impressed upon him.

Field technician Daniel Blankenburger testified that he attended a February field service technician meeting at which the busing and lottery assignment plan was announced and discussed and numbers drawn. He testified that he, Jackson, Koller, and field technician Don Pugh all expressed opposition to crossing of picket lines at Peabody mines. Like Jackson, in direct examination he was silent as to the discussion of consequences of a refusal to cross picket lines at the meeting itself. However, like Jackson, he testified that he initiated a personal conversation with Morris privately in Morris' office. He asked Morris what would happen if he refused to cross a picket line if he were dispatched pursuant to the lottery in which he drew the number one assignment. Blankenburger testified that Morris responded, "You would be up for disciplinary reaction [sic], up to and including dismissal of your job, for refusing to do a job order." In cross-examination, Blankenburger testified that with respect to the lottery discussion the employees were told it "boiled down to either accepting the lottery dispatch or losing their jobs." He admitted that Morris did not use the word "discharged."

Field technician Donald Pugh testified that he recalled two meetings in February, a first meeting and, next, the lottery discussion meeting at which picket line crossing refusal consequences were discussed. However, he testified that he did not recall the first meeting discussion but that the second meeting "sticks out" in his memory. He testified that at the meeting he asked Morris if the technicians would be fired if they refused to cross the Peabody picket line and Morris answered, "Yes." He testified that he then asked if they all refused, would they all be fired and Morris again answered with a categorical "yes."

Field technician Arnold Winstead testified that he was present at a February meeting of field service technicians with Morris and other Respondent representatives a few days

before the lottery meeting, at which Morris discussed Respondent's situation whereby Peabody had called on it for support during the strike. According to Winstead, Morris responded to inquiries of picket line cross refusal consequences by saying that "disciplinary action . . . up to and including dismissal" would be the consequence for a refusal to cross the Peabody picket line. Although he testified that the same subject was discussed at the lottery meeting, counsel neglected to ask about it. On cross-examination, he conceded that many other things were discussed but the discipline and dismissal response was that kind of statement that "sticks in your mind." His demeanor was very convincing. He was corroborated by field technician Phillip Doshier who also remembered Morris' reference to Respondent's work rules and a statement by Morris that pursuant to those work rules, the technicians would be required to cross the Peabody picket line subject to discipline "up to and including dismissal."

Morris testified that during the February meetings there was some "pretty blunt" conversation between himself and the service technicians regarding the busing and lottery scheme. He testified that he was under constant pressure from Peabody and that their relationship with Respondent had become strained. He testified that at the lottery meeting the technicians again raised the question of consequences of a picket line crossing refusal. He testified with a somewhat generalized response that to all such questions, his answer "was never a threat"; and that Respondent had to address the customer's demands and the employees' safety. He testified that Respondent's managers went into those employee meetings "not making demands." He testified, "I think the exact words were, we would take appropriate action based on our employee handbook guidelines, is I believe, our exact wording." He then again testified with a generalized denial that he did not "threaten any employees" at the meetings, which he characterized as very informal. He did not explicitly contradict the testimony of the foregoing witnesses concerning individual confrontations. He did not categorically deny the reference to "disciplinary action up to and including dismissal." When recalling his statements as to employment consequences of picket line crossing refusals, he was hesitant and uncertain in demeanor. He admitted that if Jackson claimed that he had talked to him about picket line crossing concerns, then he did so, although Morris could not recall it. Finally, he admitted that the lottery was based on pure chance but had Jackson's number for dispatch been drawn, he would have been obliged to go to the Peabody site, cross the picket line by bus, and work there for 12 days. He testified that all employees were obliged to perform work at Peabody inasmuch as arrangements had been made for their safety, and a refusal to do so would have been against Respondent's guidelines contained in the employee handbook. That handbook was never adduced with evidence, and its substance was never explicated.

From the varying accounts of the witnesses, I conclude that the meetings were not the most orderly functions, particularly after the announcement of the lottery stratagem. Discussion ensued not only between Morris and individual field technicians, but between the technicians themselves. Thus it is possible that not every witness recalled everything that was said by Morris because of the distractions of multiple conversations, but certain statements left a strong im-

pression upon the memories at the point in time when they heard it.

C. Old Ben and Forrest Jackson

The Union initiated a strike at the Old Ben Coal Company facilities on May 10, 1993, including mine 1 at Spurgeon near Lynchville, 35–40 miles from Evansville, which was serviced by Respondent. It had not been serviced by Respondent during the February events described above because it had been inoperative. During the summer of 1993, it is admitted that Respondent assigned overtime work to its field technicians at a variety of customers' worksites. Morris testified that he informed Old Ben that Respondent was not concerned about the strike and picketing at mine 1 but it would attempt to service that facility. He testified that Respondent did, in fact, service mine 1 daily as needed despite the picket line. He failed to testify when the first dispatch was made to Old Ben mine 1 after May 10. As an adverse witness called and examined by the General Counsel, he testified that on June 7, that Jackson was the field service technician "available" at the time when a call for service came in from mine 1. Morris testified later in cross-examination as a Respondent witness that Respondent intended to provide service to Old Ben at mine 1 and a field technician's availability was obligatory and not dependent on that field technician's willingness to cross the picket line.

At the time of the June 7 and 8 events, Old Ben mine 1 had stationed there six CAT 657 E Scrapers, i.e., the million-dollar behemoths described above. He testified that those machines were equipped with sophisticated electronic devices related to the shifting of the transmission based on revolutions per minute of the engine, of which certain application of design problems was being experienced there. He testified as a Respondent witness that Forrest Jackson, as a field technician, had been involved in those service problems. He further testified that Old Ben had looked to Jackson for "hands on experience" to resolve those problems, in most of which Jackson had been involved. Thus, the emphasis in Morris' testimony changed. At first, Morris' testimony would lead us to believe that on June 7 Jackson was the field technician who was the field technician available and waiting for an incoming service call and, thus, assigned to it that day. In later testimony, Morris suggests in generalized terms that Jackson was an Old Ben mine 1 specialist. However, it is undisputed that Morris did not make the daily assignments nor was he involved in the decisional consequences of Jackson's refusal to cross the Old Ben picket line when sent there on June 8.

Jackson testified credibly and without explicit contradiction that, although some field technicians serviced certain customers exclusively, he did not and that further he, like other technicians, serviced a variety of jobs that lasted from 1 day to 1 week, and even 1 month, pursuant to Stratman's dispatching. It is also Jackson's uncontradicted testimony that in the past his request to be relieved of certain assignments for personal reasons had been granted without impunity and also that he had been dispatched to relieve another field technician who had already been working at a service site.

Jackson testified, without contradiction, that he had been aware of no service dispatch for Respondent to Old Ben mine 1 between May 10 and June 7. He conceded on cross-examination that he did spend 80 to 90 percent of his time servicing the aforescribed 675 E Scraper problem for the

six scrapers at Old Ben mine 1 as well as four scrapers at mine 2 prior to the May 10 strike. Jackson explained that the specific nature of the machine problems was such that the manufacturer had sent its own engineers to the Old Ben sites, and that at Old Ben's request, Jackson had visited the manufacturing plant in Peoria, Illinois, in an attempt to resolve the problem. He admitted that Old Ben had "at times" specifically requested his services and even communicated with him at his home regarding the 657 E Scraper problems. He testified that consequently, in order to resolve those problems, the manufacturer provided modifications in the form of new controls which he installed in those machines. The dates and duration of these prestrike events were not specified.

Jackson conceded on cross-examination that on Friday, June 4, he received a telephone call from Old Ben mine 1 Supervisor James Jones and the shop foreman at Old Ben mine 2, Chuck Vinnage, who were referred to him by Stratman regarding some scraper problem. Jackson advised them on what to check and how to check certain electric or electronic switches. Jackson admitted that the next day he had received a message at home that he had been again called by the Old Ben supervisors but he was absent on a job at another customer, the Amex Delta customer, which had not been involved in a strike. Jackson admitted that on June 7 Stratman "probably" told him that Jones had called and asked for Jackson. He testified that it did not surprise him because he had been told on Friday that one of the six 657 E Scrapers at mine 1 had been down. Stratman did not testify.

Jackson testified, without contradiction, that prior to June 7 he had not been dispatched to the Old Ben site for 1 or 1-1/2 months. It is not established when Old Ben resumed production but, from this testimony, it would appear that Old Ben mine 1 had been in production at least by May 7 or mid to late April 1993, at which time Jackson apparently tended the 657 E problems. Jackson testified without contradiction to the events of June 7 and 8, 1993. On June 7, Stratman dispatched Jackson to the mine 1. At about 9 a.m., Jackson reached the site. There were two entrances. Jackson neared the main entrance and stopped his vehicle as pickets approached. He observed Old Ben employees cross the picket line. He was aware that a Respondent supply vehicle had "probably" entered earlier without incident except for some verbal abuse. He saw six or seven pickets sitting on lawn chairs. He conceded that he did not feel unsafe at that moment. Jackson asked the pickets who had approached his vehicle whether he could cross safely to do his job. Without answering his question or assuring his safety, they told him instead that they would rather that he not cross the picket line. He testified that although he saw no sign of violence, he, nevertheless, felt unsafe at that point. He drove away to a nearby telephone location in Spurgeon where, by means of mobile radio contact with Stratman, whom he had told that he felt unsafe, Jackson talked by telephone to Skaggs. Jackson told Skaggs that he decided not to cross the picket line because he felt it was unsafe. He admitted to Skaggs that he saw no signs of any kind of weapon. Skaggs told Jackson that he was sending him home without pay for the balance of that workday but to report to the Evansville facility the next day. No one replaced Jackson at mine 1 on June 7.

On June 8, Jackson arrived at the Evansville facility as usual at 6:30 a.m. for dispatch. In answer to Jackson's ques-

tion, Stratman told him that neither Morris nor Skaggs wished to discuss with Jackson the events of June 7. However, Jackson was again dispatched to Old Ben mine 1. Again, Jackson approached the main entrance and stopped. He recognized and spoke to a picketing Old Ben mechanic, Mike Cromer, whom he recognized. Jackson asked the same question and received the identical response of June 7. He similarly drove away and called Stratman by truck radio and said he felt it was unsafe to cross the picket line. He again arranged to talk to Skaggs by telephone at a nearby location. He again told Skaggs he felt unsafe to cross the union picket line. He admitted that Skaggs offered to come and ride in the vehicle if he would drive across the picket line. Jackson refused. Jackson admitted that there were no physical obstructions in the entrance road to the mine. Skaggs told Jackson to return to the Evansville facility at about 8:30 a.m. Jackson entered Skaggs' office to report to him. Skaggs was talking to someone on the telephone. Jackson heard Skaggs tell this person that he had to "fire" one of his men.

When Skaggs finished his conversation, he turned and asked Jackson what was the problem at the Old Ben mine 1 picket line. Jackson said he felt unsafe. Skaggs asked whether he would change his mind. Jackson replied that he would not. Skaggs said Jackson would have to be "let go" by Skaggs and that Skaggs planned to "replace" him. Skaggs refused Jackson's request to drive Respondent's vehicle home and was ordered to unload his personal property at the facility, to which he returned on June 9 to retrieve, as well as to obtain, checks for pay, vacation pay, and other incidentals. He subsequently returned to give back his uniform and to clear up insurance matters. He was never recalled. On June 8, 1993, Jackson observed that after his refusal, the dispatch to the Old Ben mine 1 was assigned to and serviced by technician Kenney Schmitt.

Morris testified that after June 8 Respondent had dispatched shop and field technicians to the Old Ben mine 1, which was serviced by them as they were needed without any problems. However, he admitted that after June 8 the dispatch to the Old Ben mine 1 was done on a volunteer basis only and there was no need to order anyone to cross the picket line. Morris testified that on and about June 8 and thereafter Respondent's technicians received heavy amounts of overtime work and that the loss of Jackson's services thereafter increased the use of overtime. No new field technicians were hired after June 8, and their number remained at 13 up to the time of the trial. No shop technician was promoted to a field technician position, nor was any new shop technician hired.

By interoffice memorandum, Davis ordered Morris and Skaggs to "fully" document the events of June 7 and 8 regarding Jackson's refusal to cross the picket line. Consequently, such documentation in the form of memoranda was placed in Respondent's personnel records and introduced into evidence by the General Counsel. Skaggs did not testify.

That memoranda set forth that Jackson was dispatched by Skaggs to Old Ben on June 7 to "check on a problem" which had been discussed between Jackson and Old Ben on June 4. It stated not that Old Ben expressly asked for Jackson, or Jackson exclusively, but, rather, that Stratman sent Jackson because of his past familiarity with 657 E problems at Old Ben. It also stated that all other field technicians were unavailable and working at other sites. The memoranda,

phrased in the first person by apparently Skaggs, indicated that Jackson was suspended without pay for the balance of June 7 because of his refusal to cross the Old Ben picket line to service the customer.

The June 8 memorandum indicates that Skaggs had told Jackson that he was permanently replaced and that Skaggs immediately instructed Stratman to dispatch another "field technician" to Old Ben to attend this problem and that, in consequence, technician Kenney Schmitt did so.

Inasmuch as neither Stratman nor Skaggs testified, I credit the testimony of the flesh and blood witness over the ex post facto file memoranda whenever it conflicts with the testimony of Jackson. However, from that memoranda, we see no evidence that Old Ben demanded the exclusive services of Jackson, and we see that, unlike June 7, there was available another technician who, in fact, did service Old Ben mine 1. In fact, a June 7 memorandum recording a telephone conversation between either Skaggs or Morris and Jim Jones at 1:30 p.m. reveals that, upon being tendered an apology for the inability to send any "servicemen" to Old Ben on Saturday, June 5, because of lack of availability of any, Jones responded "that it would be OK and that he heard that Forrest [Jackson] had a problem with crossing the picket line." This is not the recordation of a serious problem with an irate, demanding customer who was supposedly severely frustrated by the unavailability of Jackson's physical presence at the jobsite.

There is no evidence that the delay of 1 more day, supposedly to respond to a longstanding inherent problem in the 657 E at Big Ben, seriously impacted Old Ben operations or the relationship between Big Ben and Respondent. There is no evidence that Schmitt did not satisfactorily solve the problem of June 8. Neither the urgency, seriousness, nor complexity of the Old Ben calls of June 5, 7, or 8 are disclosed in the record.

By letter dated July 21, 1993, and signed by Personnel Manager Charles Campbell, Respondent represented to the Indiana Division of Employment and Training Services, wherein it also protested charges against its reserve account, that:

It is our position that Mr. Jackson demonstrated unacceptable behavior resulting in gross misconduct during his employment. One June 8, 1993, Mr. Jackson refused to perform assigned work at a union picketed mine site. Consequently, he was permanently replaced after refusing to perform available work.

Jackson had no communication with Respondent thereafter except for a letter dated October 25, 1993, sent to Respondent by him in which he offered to give Respondent "a chance to resolve the matter of my being fired on June 8, 1993," and stating, "I am still awaiting reinstatement to my job now as I have been since the date of firing on June 8, 1993." He received no reply.

D. The June 28, 1993 Conversation

Field technician Herschel Koller testified with respect to a conversation with Stratman on June 25, 1993. Stratman did not testify. Koller testified that he had been on medical leave from June 7 and had returned to work the week of June 28, on or about which date he engaged in a morning discussion

with Stratman about Jackson's nonemployment. The details of that conversation were not given. Koller recalled that Stratman told him that Jackson had been "dismissed" because he would not cross a picket line and also made some kind of reference about Jackson refusing a job assignment. On cross-examination, he was very certain that Stratman did not use the words "replace Mr. Jackson."

Analysis

The only factual credibility resolutions to be made in this case relate to the alleged threats of Branch Manager Morris to the field service technicians at and about the time of the February 1992 meetings regarding the Peabody strike.

Counsel for Respondent stresses the selective nature of the recollection of the technician witnesses and the fact that some testified to threats during individual confrontations but not at the meetings, and others could recall little else of substance discussed at the meetings. I agree that such testimony is vulnerable and ordinarily would seriously inhibit credibility. However, as noted above, given the disorganized nature of the meetings and the concurrence of ongoing conversations, it is understandable that some witnesses did not hear what other witnesses heard Morris say with respect to the consequences of a picket line crossing refusal. As to selectivity of recollection, the witnesses' demeanor demonstrated a marked conviction that they remembered what they heard as to that particular response to that particular question because, by its nature, it literally grabbed their attention and implemented itself in their memoirs inasmuch as it affected their livelihoods. I conclude they honestly believed that Morris told them what they testified he told them.

Morris, on the other hand, was patently uneasy and not forcefully certain in his demeanor when answering his counsel's question as to his responses to the employees. He did not even contradict the testimony as to individual confrontations. He did not categorically deny the specific statements attributed to him except as to generalized disclaimers of "threats." If Morris merely referred to the employee handbook guidelines when asked to tell the employees who asked about explicit consequences, then that would have been a most improbable, evasive, and obtuse response in a discussion Morris himself described as pretty "blunt," i.e., to the point. I find it incredible that Morris would have been so evasive in such a definitive discussion as to specific courses of action to be taken during the Peabody strike. Morris admitted that Jackson (and any other technicians) would have been obliged to cross the Peabody picket line to perform the job inasmuch as Respondent provided for the technician's safety and even provided what it characterized as the fairest means of selection, i.e., the lottery. Given the clear determination of Respondent's intent toward its perceived employee obligation to perform the assigned job, I do not believe that Morris merely obliquely referred to the employee handbook. Furthermore, given the context of the perceived employee obligation to perform an assigned job, a reference to the employee handbook, could necessarily only have been perceived by employees as a reference to the consequences that must necessarily have been set forth therein for refusing to perform assigned work. It is a fair inference that the consequences were undesirable. Respondent did not proffer the handbook into evidence, and there is no other evidence that the handbook set forth any mitigating circumstances for a job

order refusal, nor that it made allusion to an employee's statutory rights under the Act. Standing by itself, Morris' testimony can arguably be construed as having admitted to an implied threat of discipline. However, it is unnecessary to so find, because I credit the testimony of the field service technicians that Morris told them individually and in a group, quite bluntly, that if they refused to cross the Peabody picket line by bus to perform the assigned job in a 12-day shift they would be disciplined up to and including dismissal. Even Morris failed to testify that any qualification or explanation was given to the employees as to replacement of workers rather than discipline and or discharge. Respondent argues that because Jackson subsequently refused to cross the Old Ben picket line, no prior threat of dismissal could have been made. However, the Peabody situation was different. Employee safety was assured by busing, and fairness of a chance selection was used. Given those assurances, Respondent perceived an employee obligation to cross the Peabody picket line. At Old Ben, the employees were left to their own devices to obtain entry as in past such situations.

The Peabody strike meeting, Morris' testimony, the file memoranda of June 7 and 8, and the communication to the state agency thereafter regarding Jackson's unemployment compensation claim all form a context which reveal Respondent's mind-set toward an employee's refusal to cross a picket line to perform assigned work. The Respondent concluded that the employee was obliged to do so if, from Respondent's viewpoint, there was no imminent threat to the employee's safety or to his property.

This attitude was a change from past practice, which Jackson attempted to follow on June 7 and 8, i.e., drive to the jobsite and, on the employee's discretion, cross or not enter cross a picket line. Thus, in the July 21 letter to the state agency, Jackson was accused of "gross misconduct." In the June 7 file memorandum, Skaggs sets forth that Jackson was told by Stratman:

Go to the minesite and if there is no violence or any sign of violence other than verbal abuse, go on into the mine. If personnel say anything, *tell them your job is on the line if you don't go in.* [Emphasis added.]

In that same memo, Skaggs "suspended" Jackson for the day and made no attempt to replace him at Peabody nor to assign Jackson elsewhere. The June 8 memorandum reflects that Skaggs claimed he told Jackson that refusing to cross a picket line "when no threat existed constituted refusing a job assignment"

In all of Respondent's file memoranda and in Morris' testimony, there is great emphasis on Respondent's conclusion that Jackson's personal safety was not at risk. That factor is strongly stressed in Respondent's brief to justify Respondent's motivation. Thus, the implication is that if Jackson's personal safety had been at risk his obligation to cross the picket line would have abated. But, because Respondent perceived no threat to safety, it therefore perceived Jackson to have allied himself with the pickets and the strike without a motivation acceptable to the Respondent.

Given the foregoing background context, we now face Respondent's argument that Jackson was not discharged, but rather he was replaced on June 8. Jackson had been forewarned by Morris previously that he would be subjected to

discipline and dismissal if he refused to be bused across the picket line at the Peabody mine. However, he persisted in following Respondent's past practices at the Old Ben site which did not involve entry by busing. He was suspended on June 7 because he did so and was not replaced that day. He again persisted on June 8. He was sent to Skaggs' office. He entered. On doing so, he heard Skaggs tell someone on the telephone that he was about to "fire" an employee. When Jackson refused to relent in his refusal to cross the Old Ben picket line, he was told that he was "let go" and that Skaggs intended to replace him. Nowhere in testimony or file memoranda was Jackson ever told that there was a unique need for his services at Old Ben rather than any other field technician's services. Jackson immediately had to clean out his personal effects, and his paychecks were forthwith issued the next day. Having been warned that a picket line refusal would incur discipline up to dismissal at the Peabody site, having heard the telephone reference to discharge at a point in time when there was no evidence of anyone else being fired, having been told he was "let go" and ordered to remove his personal property from his vehicle, Jackson must necessarily have concluded that he was categorically and quite clearly discharged, i.e., his employment relationship completely severed without expectation of any future connection. Contrary to Respondent's argument in the brief, this is no semantical exercise. The meaning to Jackson was clear, i.e., the employment relationship was permanently severed without future residual rights. Thus he perceived it, and continued to perceive it through October, as evidenced by his letter to Respondent in which the perception of discharge was never subsequently challenged by any response.

The accuracy of Jackson's perception of discharge was confirmed by Stratman's subsequent explanation to Koller of Jackson's absence, i.e., he had been "dismissed" because of a refusal to cross the picket line and refusing to perform the job assignment. It would have been futile for an employee who had understood himself to be summarily discharged to offer thereafter to return to work unconditionally.

As set forth in the briefs, the parties herein recognized that when an employee refuses to cross a picket line of another employer's employees, which picketing constitutes concerted protested activity under the Act, he allies himself and makes common cause with that activity and thereby engages in activity protected by the Act regardless of his motivation for so doing, be it fear, business reasons, or ideology, and may not be discharged lawfully because of it. *Redwing Carriers*, 137 NLRB 1545 (1962); *ABS Co.*, 269 NLRB 774 (1984); and *American Transportation Service*, 310 NLRB 294 (1993). The parties further recognize that an employer has, for sufficient business justification, a right to replace an employee who allies himself with such stranger picketing. Thus, the employee "becomes akin to an economic striker, and thereafter the employee remains entitled to reinstatement upon an unconditional offer to return to work if not permanently replaced" and further entitled to reinstatement if and when the permanent replacement departs. *G & S Transportation*, 286 NLRB 762 fn. 1 (1987). See also the distinction between discharge and replacement discussed by the court in *NLRB v. Browning-Ferris Industries*, 700 F.2d 385, 389 (7th Cir. 1983).

In this case, there is no issue as to the protected nature of the strike and picketing at Peabody and Old Ben

minesites, i.e., an economic strike arising from the expiration of the National Bituminous Coal Wage Agreement and the ensuing failure of agreement between the Union and the mines.

Respondent argues that it did not discharge Jackson, regardless of what it claims may be the inartful expressions of its agents.² However, as noted above, I find nothing ambiguous about the message to Jackson. He was told in clear enough terms that his employment relationship was severed completely, regardless of references to an expressed intent to replace him. That, I find, is subsequently the substance of what happened. He was told, in effect, that he was discharged. Whether Jackson was discharged, Respondent argues that it was entitled to terminate Jackson because it had to replace him for justifiable business reasons and was not obliged to reshuffle its work force to accommodate Jackson's predilections, citing, inter alia, *Con-Way Central Express*, 305 NLRB 837 (1991).³ However, reshuffling, not replacing, is exactly what Respondent did in this case on June 8 and thereafter until the end of the strike.

The facts of this case demonstrate that Jackson was not replaced in his job temporarily or permanently. His job, like many other field technicians, was to serve on ad hoc call, any number of customers. That he concentrated his services at Old Ben prior to the strike was due to a specific problem with respect to six 657 E Scrapers that was in the process of being resolved. Jackson's job was not the exclusive Old Ben service technician. Indeed, on June 5, he was unavailable to Old Ben because he was servicing another customer. Although it is highly probable, it is not clearly demonstrated that the June 7 and 8 Old Ben calls did, in fact, relate to the 675 E problem previously discussed with Jackson. In any event, there was no such thing as an exclusive Old Ben field service technician position which was replaced by any particular service technician. No technician was transferred to a different position. No one was promoted to field service technician from a shop technician position. Stratman was told to send another "field technician" to Old Ben. He sent Schmitt. Morris testified that for the duration of the strike, the Old Ben mine 1 was serviced on a volunteer basis by which shop and field service technicians essentially serviced that mine as calls were received.⁴ Thus, in fact, Respondent did reshuffle its service technicians without any shown inconvenience to itself nor to Old Ben. It did at Old Ben thereafter by volunteers—what it intended to do at Peabody by lottery, i.e., chance availability. Not only is there no conclusive evidence that the June 7 and 8 Old Ben service calls related directly to the preexisting 657 E Scraper problem or

² Despite its answer, Respondent does not argue that the managers herein are not agents within the meaning of the Act. They clearly are: Stratman had the authority to assign work. Morris was superior to him and had responsibility for branch operations as well as being the spokesman for Respondent who set forth work policy to the Evansville employees. Skaggs was superior to Stratman and made decisions as to work assignments, supervisors and work terminations.

³ See also *Redwing Carriers*, supra at 1547, in which the Board discusses the employer's right to discharge sympathy strikers to preserve the efficiency of its operations but only so it could "immediately or within a short period thereafter replace them with others willing to perform the scheduled work."

⁴ That Respondent was able to elicit sufficient volunteers is understandable given its prior threats of dismissal and the actual dismissal of Jackson.

that it necessarily entailed Jackson's scrutiny, there is no evidence that precise problem continued thereafter and was not solved on or before June 8. The precise nature of the June 7 and 8 calls were never defined by any witness, but were merely presumed to relate to prior problems with which Jackson was familiar. They may or may not have related to the switching problem discussed between Jackson and Old Ben representatives on June 4. We do not know whether the switching problem was an intermittent or constant problem or whether it was disabling or merely inconvenient to Old Ben. Finally, no new field technicians were hired thereafter and there is no evidence that any shop technician was hired. Respondent argues that it successfully coped with one less employee by virtue of more overtime work or increased efficiency is irrelevant. I find, however, that it is clear evidence that Jackson's position was never replaced with any other technicians.

I therefore find that Jackson was not replaced on June 7 or 8. I find that he was suspended on June 7 and discharged on June 8 because he refused to cross a picket line in order to perform his job and thus made common cause with the protected activity of Old Ben's employees and was perceived by Respondent to do so for reasons other than personal safety, i.e., ideological reasons. As a discharged employee, I conclude that Jackson was therefore not "akin" to replaced economic strikers on whom it was incumbent to make an unconditional offer of reinstatement.

Respondent finally argues that even if Jackson is to be considered as having been discharged and not replaced, Respondent's greater business interests must be balanced against Jackson's more tangential statutory rights to engage in protected activity. Respondent cites, in support of this balancing of interests test, on a case-by-case basis, inter alia, the opinion of the court in *Business Services By Manpower v. NLRB*, 784 F.2d 442 (2d Cir. 1986). The General Counsel responds that the Board expressly rejected that balancing test in *G & S Transportation*, supra, fn. 1. Respondent argues further that the Board has in recent cases followed the rationale of the Second Circuit, citing *Con-Way Central Express*, supra; *Anaconda Insulation Co.*, 298 NLRB 1105 (1990); and *Western Stress, Inc.*, 290 NLRB 678 (1988).

In *Western Stress*, however, the Board merely observed that "even under" the *Business Services* rationale, the *Western Stress* employer failed to show prevailing business interests over the statutory right of discharged employees who refused to cross a stranger picket line. The Board stated that the employer completed the dischargee's work with other employees "in a couple of hours." In this case, there is no showing how long it took Schmitt, who is identified as a shop technician, to complete the June 8 call, nor is there any showing that a shop technician would not have done the same on June 7. Because Respondent immediately after June 8 instituted a volunteer assignment to Old Ben on technician availability, it can be reasonably inferred that there was no need for an Old Ben specialist thereafter and that whatever prompted the need for Jackson on June 8, if it existed at all, was dissipated on June 8 by virtue of Schmitt's services. Further, in the *Western Stress* case, the Board distinguished the facts of that case from *Business Services* where it was found that "business was lost forever" because of the picket line crossing refusal. In this case, there has been no showing of even inconvenience to Old Ben, much less a loss of its

business. Rather, the evidence discloses that the volunteer system worked well for the strike duration.

In the *Anaconda* case, the Board adopted the decision of Judge Robertson. The judge found that the employee who had refused to cross a stranger picket line had been discharged, rather than quit as argued by his employer. The respondent in *Anaconda* relied on *Business Services*, supra, in arguing, inter alia, that the discharge was necessary for business reasons. Judge Robertson analyzed at length the court's rationale in *Browning-Ferris*, supra. The judge then stated:

In *Browning-Ferris*, Judge Posner found that the employer did not discharge the employees, and for that reason, the Board's finding of a violation was reversed.

Here, I have difficulty rationalizing Respondent's arguments in light of *Browning-Ferris*. It appears to be Respondent's contention that it was forced to either discharge or permanently replace Ralph Bruce Piper for business reasons.

Judge Robertson went on to find that there was no business justification, and that the dischargee had not been replaced on the day after he was terminated. He found further that unlike *Business Services*, supra, the dischargee's absence from his assigned job because of the picket line caused his employer no demonstrable inconvenience, as indeed neither did his previous absences for other reasons, which had been tolerated. (In nonstrike situations, Jackson's absence was similarly excused.) In finding a violation, Judge Robertson went on to recommend an order of reinstatement which the Board adopted. There was no evidence that the discriminatee ever offered to return to work unconditionally nor any finding that he, as a dischargee, had to do so.

The *Con-Way* case also involved the adoption of an administrative law judge's decision by the Board. That case did not involve a discharge but rather the replacement of a driver who refused a dispatch because of his support for a non-violent economic strike. The General Counsel argued that there had been no permanent replacement of the driver. Judge Schlesinger noted the Board's analysis in *G & S Transportation*, supra, in reference to equating a replaced sympathy striker to an economic striker. He found that the driver in question, a "peddle driver," occupied a distinct position which required replacement either by a new driver or another driver. Judge Schlesinger found that the distinct driver position was permanently assigned to another driver and, when that driver was injured, to another driver. There had been no mere reshuffling of interchangeable drivers in that case as occurred on and after June 8 in Respondent's operations. In *Con-Way*, the replacement served a dedicated route of the same customers. Further, Judge Schlesinger found that the employer was put to more than a minor inconvenience because it had to train the replacement and could not merely shuffle the replaced driver route to other drivers who were entitled to keep their own runs obtained under a bidding process. The facts of the *Con-Way* case are thus distinguishable from this case.

Respondent recognizes that under the balancing test it had the burden of demonstrating a legitimate business reason for the dismissal of Jackson but argues that it had sustained that burden and that the burden of proof shifted to the General Counsel to establish That the Respondent's motivation was

retaliatory for Jackson's striker sympathies, citing in support the court decision in *NLRB v. William S. Carroll, Inc.*, 578 F.2d 1, 3-4 (1st Cir. 1978).

I do not agree that in the cases cited above the Board explicitly adopted the balancing test in clear discharge situations. Rather, the Board in *Western Stress* appears to have stated that under either analysis the employer there did not establish sufficient business justification. Similarly, in this case, I find that even if the balancing test is appropriate Respondent did not demonstrate a justifiable business reason that outweighed Jackson's statutory right to engage in activity protected under the Act from discipline or discharge. At most, Respondent has demonstrated that certain assumptions were made as to the particular usefulness of Jackson's services at the Old Ben mine on June 7 and 8. It has demonstrated neither necessity nor convenience for his unique abilities there on that date nor has it demonstrated any significant inconvenience either to itself or Old Ben as a result of Jackson's refusal to cross the picket line. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by suspending Jackson on June 7 and discharging him on June 8, 1993, because of his activities protected by Section 7 of the Act. I find it unnecessary to decide whether the discipline and discharge also violated Section 8(a)(3) of the Act. *American Transportation Service*, supra, fn. 2.

With respect to the February 1993 threats of dismissal to field technicians if they refused to cross the Peabody picket line, I agree with the General Counsel that those statements clearly tend to inhibit employees' rights to engage in activities protected by the Act, despite the fact that they did not deter Jackson. *Savage Gateway Supermarket*, 286 NLRB 180, 184 (1987); *G & S Transportation*, supra. I do not agree that the threats should be ignored as trivial or isolated or that, because they were not made in an overtly hostile manner, they did not tend to be coercive. The uncontradicted evidence in the record is that most of the technicians had openly expressed opposition to crossing a picket line which they had never previously been obliged to do. Yet, after these threats, particularly in the context of Jackson's discharge, Respondent had no trouble eliciting volunteers to cross the Old Ben picket line. I find the February threats of discipline and dismissal to have clearly tended to be coercive and violative of Section 8(a)(1) of the Act as alleged in the complaint as amended.

With respect to the June 20 confrontation between Koller and Stratman, the complaint alleges an explicit threat of discharge. The evidence reveals that Stratman told Koller that Jackson had been dismissed because he refused to cross a picket line. That kind of statement, regardless of whether it is characterized as an implied threat or not, given as it was without mitigating explanation, clearly tends to discourage employees from engaging in similar activities protected by the Act. I find that it violated the Act.

CONCLUSIONS OF LAW

1. Respondent Wayne Supply Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act.
3. By threatening its employees with discipline up to and including discharge if they refused to cross picket lines main-

tained by the United Mine Workers of America, Respondent violated Section 8(a)(1) of the Act.

4. By telling its employee that it had discharged another employee because he refused to cross the above Union's picket line, Respondent violated Section 8(a)(1) of the Act.

5. By suspending employee Forrest Jackson on June 7, 1993, and by discharging him on June 8, 1993, because he refused to cross a picket line maintained by the above Union, Respondent violated Section 8(a)(1) of the Act.

6. The foregoing unfair labor practices interfere with commerce within the meaning of the Act.

THE REMEDY

Having found Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent terminated the employment of Forrest Jackson and failed and refused to reemploy him thereafter because he engaged in concerted activities for mutual aid and protection guaranteed by the Act, I shall recommend the Board order Respondent to offer him immediate reinstatement to his former position or, if it no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and to make him whole for any loss of earnings he may have suffered by reason of the discrimination against him by making payment to him of a sum of money equal to the amount he normally would have earned from the date of his termination to the date of his reinstatement, less his interim earnings, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); see also *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Wayne Supply Company, Evansville, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discipline up to and including discharge if they cross a picket line maintained by the United Mine Workers of America, or any other union.

(b) Telling its employees that it had discharged an employee because he had refused to cross a picket line maintained by the above-named Union, or any other union.

(c) Suspending or discharging employees because of their protected concerted activities protected under the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

⁵If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Offer immediate and full reinstatement to employee Forrest Jackson to the position he would have held, but for Respondent's wrongful suspension and discharge of him on June 7 and 8, 1993.

(b) Make whole employee Forrest Jackson for any and all losses incurred as a result of Respondent's unlawful termination of him, with interest, as provided in the remedy section of this decision.

(c) Expunge from its files any and all references to the suspension and discharge of employee Forrest Jackson and notify him in writing that this has been done and that the fact of his wrongful suspension and discharge will not be used against him in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order and to ensure that this Order has been fully complied with.

(e) Post at its Evansville, Indiana facility copies of the attached notice marked "Appendix."⁶ Copies of the notice, in English and such additional languages as the Regional Director determines are necessary to fully communicate with employees, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁶If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."